IN THE UNITED STATES CIRCUIT COURT OF APPEALS—FIFTH CIRCUIT.

WILLIAM A. WRIGHT, Comptroller-General, Appellant, vs. LOUISVILLE & NASHVILLE RAILROAD CO., and ATLANTIC COAST LINE RAILROAD CO., Appellees.	Appeal from the United States Circuit Court for the Northern District of Georgia.

BRIEF OF KING & SPALDING FOR APPELLEES.

STATEMENT OF THE CASE.

This cause originates in a bill in equity filed by the Appellees against the Appellant and the Georgia Railroad and Banking Company, a corporation created under the laws of Georgia, to enjoin the enforcement by Appellant, and the payment by the Georgia Railroad and Banking Company of an amount claimed as taxes, alleged to be due for the year 1900, on fifteen thousand (15,000) shares of capital stock of the Western Railway of Alabama, a corporation created under the laws of the State of Alabama. (Transcript, pp. 1-7.)

The case was tried upon the bill, the answer of the defendant, and an agreed statements of facts—the answer adopting said agreed statement of facts, and setting up that the bill made no case entitling plaintiff to relief; that there was no equity in the bill; that complainants had a complete remedy at law. (Transcript, p. 10.)

The case made by such pleadings and statement was as follows:

The Western Railway of Alabama is a corporation chartered under the general laws of the State of Alabama, owning and operating a railroad extending from Selma via Montgomery to West Point, in the State of Georgia. All of said road, except a quarter of a mile, lies in the State of Alabama. This quarter (1-4) of a mile lies within the State of Georgia, and was constructed under an Act of the General Assembly of Georgia, passed in the year 1837, authorizing the predecessor of said Western Railway of Alabama to build and operate said road in the State of Georgia; said Act being a public act, and being found in the published Acts of 1837, pages 201, 202. (Transcript, p. 12.)

This property, after some prior changes of ownership, was sold in 1875 under a mortgage foreclosure, and was purchased jointly by the Georgia Railroad and Banking Company and The Central Railroad and Banking Company of Georgia, two railroad corporations of the State of Georgia; such purchase being made by authority of a public act of the General Assembly of Georgia, authorizing said companies to make such purchase. See Acts of Georgia of 1875, pages 235, 236. (Transcript, p. 12.)

Said two last-named corporations held said railroad as tenants in common, and operated the same without further incorporating it, until a time subsequent to the 7th day of May, 1881. (Transcript, p. 13.)

On the 7th day of May, 1881, the Georgia Railroad and Banking Company entered into an indenture of lease with one, William M. Wadley, whereby it leased to the said Wadley, or assigns, for the term of ninety-nine (99) years from the 1st day of April, 1881, all of its rights of transportation and its railroads, describing the same therein, and also "all the rights of ownership, management, "control and use of the Western Railroad of Alabama, which the "(said Georgia Railroad and Banking Co,) now has, or is entitled "to," &c. (Transcript, pp. 11, 22, 24.)

By said lease it was further provided that the said Georgia Railroad and Banking Company "will consent to the organization of "the owners of the Western Railroad of Alabama into a corpora- "tion; * * * * *provided*, the said incorporation shall not impair "the beneficial ownership of said railroad by the (Georgia Rail- "road and Banking Co.)" (Transcript, p. 27.)

Subsequently, in 188—, in accordance with the stipulations of said lease, a charter was applied for, and a certificate of incorporation issued by the Secretary of State for the State of Alabama, conformably to its general law, incorporating the Western Railway of Alabama. To that corporation the Georgia Railroad and Banking Company, and The Central Railroad and Banking Company conveyed the said Western Railroad of Alabama, extending from Selma, Ala., via Montgomery, to a connection with the Atlanta and West Point Railroad, in the city of West Point, Georgia, receiving from said new corporation thirty thousand (30,000) shares of its capital stock of one hundred ($100.00) dollars each, aggregating three million ($3,000,000) dollars; each of said corporations so conveying said railroad receiving fifteen thousand (15,000) of said shares. Said Western Railway of Alabama owns no property in the State of Georgia, except the small portion of railroad hereinbefore set out, located in the county of Troup, State of Georgia. (Transcript, p. 13.)

Said 15,000 shares of stock "were issued to and stand in the "name of the Georgia Railroad and Banking Company, but an "irrevocable power of attorney or proxy to vote the same has at all "times been issued and existed under said lease in favor of the les- "sees or assigns, or such person as they might designate to vote said "shares." (Transcript, p. 13.)

It was further agreed that by different assignments of the lease the Louisville and Nashville Railroad Company became the sole assign of said lease, and became the lessee of said leased property

and interests described therein, in lieu of the said Wadley, and was accepted by the Georgia Railroad and Banking Company as such sole lessee, and after being so accepted deposited one million ($1,000,000) dollars of securities acceptable to the Georgia Railroad and Banking Company, to secure the faithful performance of said lease according to the covenant made in said lease in respect to making such deposit. (Transcript, p. 11.)

For the covenant of said lease so requiring, see (Transcript, p. 28.)

Subsequently, the Atlantic Coast Line Railroad Company acquired a half interest in said lease from said Louisville and Nashville Railroad Company, and was accepted by said Georgia Railroad and Banking Company as a co-lessee with said Louisville and Nashville Railroad Company, and the Appellees are now co-lessees of said lease, and hold the same as fully and to all intents and purposes as did the said William M. Wadley. (Transcript, pp. 11, 12.)

Neither the Georgia Railroad and Banking Company nor its lessees have at any time paid any taxes on the shares of stock of the Western Railway of Alabama, issued as aforesaid. (Transcript, p. 12.)

The Western Railway of Alabama has paid to the State of Alabama all State and county taxes which have been demanded of it by said State. (Transcript, p. 12.)

About the 15th day of May, 1909, the Appellant specifically demanded of the Georgia Railroad and Banking Company that it pay taxes on said shares of stock for the year 1909, to the State of Georgia; which said sum so demanded amounts to between $7,000 and $8,000. (Transcript, p. 13.)

The blanks sent annually by the Comptroller-General to the Georgia Railroad and Banking Company to use in making its re-

[illegible] consists, among others, the following questions, to wit: "Number stocks and bonds owned by the company;" and "value of "all property not enumerated, and value of same."

[illegible] no other way than in furnishing [illegible] the Comptroller-General make demand for [illegible] and shares of stock, until about the 30th day of May, 1891, when he made the demand last above mentioned. (Transcript, 12, 20.)

[illegible] Under the Statutes of Georgia regulating railroad taxation, all [illegible] taxable by railroads, whether State, county or municipal, are required to be assessed to the [illegible] corporation owning the [illegible].

Code of Ga., sec. 1, secs. 590, 592, 596;
Railroad Co. vs. Wright, 69 Ga., 192.

It further appears, "That whatever sum or sums of money [illegible] "said Georgia Railroad and Banking Company, and known as [illegible] "ceipts for the same to said Georgia Railroad and Banking Com- "pany, without in any way diminishing the exact value [illegible] "by said assessment and [illegible]." (Transcript, p. 21.)

It was also agreed "That stockholders in the Atlanta and West "Point Railroad Company, the Georgia Railroad and Banking "Company, the Augusta and Savannah Railroad Company, and of "all corporations whose property is not assessed [illegible] "own [illegible] shares of stock for taxation." (Transcript, p. 21.)

It will [illegible] that complainants herein, the present [illegible] were without legal remedy to avoid the payment of said alleged taxes if so [illegible], and would be without remedy unless granted relief in the present proceeding. That under the laws of Georgia [illegible] of such sum can [illegible] and [illegible]

lant was proceeding without law, or color of law, in attempting to collect the same. That such attempted collection and the enforcement of such pretended taxes would take their property without due process of law, and deny to Appellees the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States. That there was no law in the State of Georgia authorizing the taxation of railroad shares of stock in the hands of the owners thereof. That under such law shares of railroad stock are mere representations of the railroad property itself, and such property must be taxed where located in Georgia, and, where not so located, is not subject to be taxed by the State of Georgia.

That the taxation of said shares would be taxation by the State of Georgia of property located in the State of Alabama.

That the State of Georgia does not tax under its law shares issued by railroad corporations of the State, but recognizes the same as mere certificates of interest in the railroad property, which is itself taxed, and that there is no law of the State creating any other or different rule for railroad shares issued upon properties lying without the State. (Transcript, pp. 5, 6.)

The bill prayed that the shares of stock be decreed to be not subject to taxation; that the Georgia Railroad and Banking Company be enjoined from returning the same for taxation or paying taxes thereon; that William A. Wright be enjoined from issuing any execution or taking any steps to collect said taxes, and be decreed to be without warrant or authority of law so to do. The prayer was also for general relief. (Transcript, p. 7.)

On the hearing the Court held that under the law of Georgia shares were but representations of the railroad property, and that foreign railroad shares were not subject to be taxed, and enjoined the defendants as prayed. (Transcript, pp. 11, 15, 20.)

Appellant thereupon appealed to this Court.

ASSIGNMENT OF ERRORS.

The errors assigned are:

1st. The overruling of the grounds of demurrer in the answer:

(*a*) That there was no equity in the bill, nor case made for equitable relief;

(*b*) That complainants were without sufficient interest to sue.

2d. Holding that the stock was not taxable in this State.

3d. Holding said shares a mere representative of the railroad property itself, and not taxable.

4th. Enjoining the Appellant from undertaking to collect said alleged tax.

5th. Enjoining the Georgia Railroad and Banking Company from paying any tax on said stock. (Transcript, pp. 32, 33.)

BRIEF OF ARGUMENT.

I.

Where a right is created by the State law in favor of its own citizens, the Federal Courts can enforce the same by appropriate remedies, at the instance of a citizen of another State.

"1. Whenever a citizen of a State can go into the courts of the "State to defend his property against the illegal acts of its officers, "a citizen of another State may invoke the jurisdiction of the Fed- "eral Courts to maintain a like defense. A State cannot tie up a "citizen of another State having property rights within its territory "invaded by unauthorized acts of its own officers, to suits for re- "dress in its own courts. Given a case where a suit can be main- "tained in the courts of the State to protect property rights, a citi- "zen of another State may invoke the jurisdiction of the Federal "Courts. *Cowles* vs. *Mercer County*, 7 *Wall*, 118; *Lincoln County*

"vs *Lunning*, 133 *U. S.* 529; *Chicot County* vs. *Sherwood*, 148 *U.*
"*S.* 529."

Reagan vs. *Farmers Loan & Trust Co.*, 154 *U. S.* 362, 392.

2. Under the practice and procedure in Georgia injunction is a proper remedy to prevent the assessment, or collection, of an illegal tax.

Where land is levied upon by the tax-collector of one county as being located therein, when the true boundary of the county shows it lies in the second county, "the tax-collector of the other county may "be restrained by injunction from collecting the taxes which would "be due to it were the tract in that county, but which are not due "because of its being in the adjoining county."

Smith, tax-collector, vs. *Dees*, 92 *Ga.* 549.

Where the provisions of a city charter requiring tax-assessors to assess all realty according to its market value on the first day of a certain month, and also requiring the return of all personalty owned by the taxpayer on the 15th of that month, are enforced so as to levy a tax on the vendor of land, both as to the realty sold and as to the proceeds of sale in cash or notes, such enforcement of the city charter should be restrained by injunction.

"Having applied to the assessors, who refused her application, "and having applied to the mayor and council, who failed and neg-"lected to act upon her petition, she had no other recourse against "this illegality than to seek an injunction from a Court of Equity."

Sheibley vs. *Rome*, 107 *Ga.* 384, 385-6.

An injunction is an appropriate remedy to restrain the Comptroller-General from proceeding prematurely with the issuance of a tax execution against a railroad company.

Wright, Comptroller-General, vs. *Railroad*, 85 *Ga.* 649, 650.

"Where any ministerial officer of this State is attempting to col-"lect money out of a person, natural or artificial, under the forms

"of law, but without any valid law to authorize the process he uses "and calls an execution for taxes, it is the duty of the courts, in a "proper case made, to arrest the proceedings in some of the modes "known to the law, and afford relief to the party justly complaining.

"Equity has jurisdiction to interfere in behalf of any person, "natural or artificial, entitled to relief on the following grounds: "(1) Where exactions are pressed in the form of annual taxes, in- "consistent with, and violative of, legal rights. (2) Because the "exactions might be repeated and wrongs multiplied."

Southwestern Railroad vs. *Wright, Comptroller-General*, 68. *Ga.* 311, 320.

Where a tax has been illegally imposed, and is illegally in process of collection by the tax-collector of a county, an injunction should be granted.

S. F. & W. Ry. vs. *Morton et al.*, 71 *Ga.* 24, 25.

Where there is no authority of law for the collection of a tax, an injunction is an appropriate remedy to prevent collection.

Staten vs. *S. F. & W. Ry.*, 111 *Ga.* 803.

It is therefore apparent that the settled remedy in Georgia, and in the courts of that State, to prevent the collection of an illegal tax, where the officer has no authority to levy or collect the same, is in equity and by injunction.

The statutory remedy provided for meeting the levy of a railroad tax execution issued by the Comptroller-General, is one known as an affidavit of illegality.

Code of Ga. of 1895, *vol. I., secs.* 782, 789.

The affidavit of illegality is in its essence an equitable proceeding to restrain the progress of an execution, and its complement in the courts of the United States is a proceeding in equity to restrain.

"Illegalities are equitable proceedings, at least in the nature of "equitable proceedings."

Higgs vs. *Huson*, 8 *Ga.* 319.

Where there is no adequate and complete remedy on the law side of the courts of the United States, a party may sue on the equity side, even when a complete remedy is furnished by the law of the State in the State Courts.

Nat. Bk. of N. O. vs. *Bohne*, 4 *Woods*, 74.

II.

Where the remedy at law is not as complete, or where a cloud upon the title might be produced, the remedy is in equity.

"Courts of Equity undoubtedly have jurisdiction to hear com-"plaints of those who assert that their lands are about to be assessed "and subjected to liens by a Board of Commission acting in pursu-"ance to the provisions of a statute which has been enacted under "the forms of law, but which is unconstitutional, and therefore does "not avail to confer the powers sought to be exercised. *Dows* vs. *Chi-"cago*, 11 *Wall*, 108; *Union Pac. Railway* vs. *Cheyenne*, 113 *U. S.* "516; *Ogden City* vs. *Armstrong*, 168 *U. S.* 224; *Dillon's Mun. Cor-"porations, vol. 2, sec.* 833, *4th Ed.*"

Wilson vs. *Lambert*, 168 *U. S.* 611, 612.

In the case last cited the board was proceeding without any law (because an unconstitutional statute is as though there was no statute). In this case, as we shall show hereafter, the Comptroller-General is undertaking to proceed without any law, as the statutes of Georgia do not embrace shares of stock in railroad corporations, either within or without the State.

Nevertheless, in this case if the Comptroller-General should make an assessment of these taxes and issue an execution upon the same against the Georgia Railroad and Banking Company, and levy upon some of its property in the State and sell it, the issuance of such an execution would *prima facie* constitute a general lien upon all of its property.

Says the statute: "On failure to pay the taxes so assessed, the "Comptroller-General shall proceed to enforce the collection of the "same in the manner provided by law for the enforcement of taxes "against the other incorporated companies before mentioned."

Code of 1895, *vol. I., sec.* 781.

"If any corporation, company * * * * * * * where required to "make their returns to the Comptroller-General, shall fail to re- "turn the taxable property or specifics, or pay annually the taxes for "which they are liable to the State Treasurer, the Comptroller- "General shall issue against them an execution for the amount of "taxes due, according to law, together with the costs and penalties."

Code of 1895, *vol. I., sec.* 874.

"The property returned or held at the time of giving in, or after, "is always subject (to the lien of taxes). A sale of property under "any other process does not divest the lien of the State for taxes."

Code of 1895, *vol. I., secs.* 883, 884.

"The deed or bill of sale (made under the tax execution) shall be "just as valid to the purchaser as if made under the ordinary proc- "ess of law issuing from the Superior Court."

Code of 1895, *vol. I., sec.* 913.

This section applies to sales under tax executions issued by the Comptroller-General.

Bedgood vs. *McLean*, 89 *Ga.* 793.

Were the Comptroller-General, therefore, to assess these taxes, and levy an execution for the same, and property to be sold thereunder, the purchaser's deed, with the Comptroller-General's execution, would constitute a good *prima facie* title, and it would be necessary to go into parol to show how the alleged tax originated, and on what property, in order to impeach the apparent validity of the tax execution as a lien clouding all of the leasehold estate of the complainants, or in order to impeach any deed which might be made under such execution, as constituting a cloud upon the title to such property so sold. In such case the remedy at law is not complete, and equity has jurisdiction.

Dows vs. *Chicago*, 11 *Wall*, 198.

Hannewinkle vs. *Georgetown*, 15 *Wall.* 547.

Ogden City vs. *Armstrong*, 168 *U. S.* 224, 238.

Again, in this case the matter would be further complicated by the fact that the Comptroller-General is proceeding against the lessor company, while the lessees are the real parties at interest, under the agreed statement of facts.

"Where the remedy at law is plain, equity will not interfere if the "remedy is also adequate and complete; but, if the remedy at law "is doubtful, the Court of Equity will retain the case, and if the "proofs are satisfactory, will grant relief."

"Jurisdiction to a partial extent may exist at law; but, if the "remedy there is not adequate—that is, if the party cannot attain "at law the full justice of the case—he may, if he sees fit, pursue "his remedy in equity. Nor is the Court of Equity closed to the "party unless the remedy at law is complete, and will secure to the "party the whole right involved in a manner as just and perfect as "would be attained in a suit in equity. 1 *Story's Eq., sec.* 33; *Ins. "Co.* vs. *Bailey*, 13 *Wall.* 621."

Clements vs. *Macheboeuf et al.*, 92 *U. S.* 418.

III.

The Appellees are vitally interested in the question of whether these alleged taxes can be lawfully assessed. They are the payees of all such demands.

1. The agreed statement of fact shows their interest in the matter. (Transcript, pp. 11, 12, 14.)

Again, the bill avers, and the answer does not deny, that a levy or sale to collect same, would be of the leased property, and would destroy or impair their enjoyment thereof.

Under the Georgia Code the party entitled to the use of property, such as the life tenant, tenant for years, &c., is the primary taxpayer.

Code of 1895, *vol. 1., sec.* 778.

Where one has an interest in the subject-matter he can maintain such litigation.

2. But in this case the Georgia Railroad and Banking Company has consented to an incorporation, subject alone to such incorporation not impairing the beneficial ownership of said Western Railroad by such Georgia Railroad and Banking Company. (Lease, Transcript, p. 27.)

The lessees are vested with "all the rights of ownership, manage-"ment, control and use of the Western Railroad of Alabama, which "the party of the first part (Ga. R. R. & Bgk. Co.) now has or is "entitled to." (Lease, Transcript, p. 24.)

We insist that this constitutes the lessees the owners of this stock, subject alone to protecting the beneficial ownership of said lessor after the expiration of said lease.

IV.

The effect of taxing shares of stock in the hands of shareholders, and the property of the corporation in its hands, is double taxation. Every presumption is against the intention to so double tax.

1. "The same may be said of a tax on the property of a corpora-"tion, and also on the capital which is invested in the property. If "the latter is taxed as property, this also is double taxation. "* * * * * When, for instance, the money paid in as capital of "a manufacturing corporation has been invested in buildings and "machinery, these are what then represent the capital, and to tax "the capital as valuable property, distinct from that which then "represents it, would be to tax a mere shadow. It would be to "make the shadow stand for the substance, in order that it might "be taxed, when the substance itself is taxed directly under its own "proper designation."

Cooley on Taxation (2 *Ed.*), *p.* 225.

"The most objectionable feature of a tax levy on shares of stock is "that almost inevitably it operates to impose a double tax on a "part or all of the shareholders. Such double tax exists where "either the corporate realty, or personalty, or franchise, or capital "is taxed, and a tax is also levied on the shares of stock without any "deduction for the former taxation. * * * * * The injustice of

"such taxation, however, generally prevents its occurrence. The "Courts also do their utmost to prevent double taxation, and will "construe a taxation statute so as to avoid such a result, and some- "times even in opposition to the plain words of the statute itself."

Cook on Stock and Stockholders (3 *Ed.*), *sec.* 567.

The Supreme Court of the United States, while recognizing the power of a State to tax the property of a corporation in its hands, and the shares of the capital stock in the hands of the individual shareholders, say:

"It is no doubt within the power of a State when not restrained "by constitutional limitations, to assess taxes upon them in a way to "subject the corporation or the stockholders to double taxation. "Double taxation is, however, never to be presumed. Justice re- "quires that the burden of government shall, as far as is practicable, "be laid equally on all, and if property is taxed once in one way, it "would, ordinarily, be wrong to tax it again in another way, when "the burden of both taxes falls on the same person. Sometimes tax "laws have that effect, but if they do it is because the legislature "has unmistakably so enacted. All presumptions are against such "an imposition."

Tenn. vs. *Whitworth*, 117 *U. S.* 129, 137.

2. The argument of Appellant is that because the State could, by express legislative enactment, create shares of stock, which are but an intangible evidence of the interest in the corporate property, into such separate, distinct, taxable property, that therefore it must follow that the State of Georgia has recognized and created shares of stock as taxable property, distinct from the property of the corporation of which they are the symbol.

We do not deny that Georgia could enact that corporations should pay taxes upon all their property. Further, could enact that shares of stock of corporations should be considered as separate and distinct property in the hands of the shareholders, and as such taxable. We, however, insist most confidently that Georgia has done no such thing. On the contrary she has by uniform decisions of her Courts recognized that the property of a corporation and the shares of stock

evidencing the interest of its members in such corporation are no more different values than the land which one of her citizens may own, and the deed which he may hold evidencing his ownership therein.

We further insist that corporate shares are of such a character that it is entirely competent for the State to recognize that they and the property of which they are the representatives constitute but one taxable subject, and that a failure to tax such shares, or a declaration that they are but symbols, and not taxable property, is not an exemption, but the mere adoption of one of the two doctrines which prevail in regard to the true *status* and nature of shares of capital stock.

3. It is admitted that Georgia rightly recognizes that the property of her corporations located in the State and the shares of the stockholders therein are but one and the same value, and that she does not attempt to tax one where the other is taxed.

It is further conceded that such double taxation would be unjust, for the reason that where the property has paid its taxes, the shares are but the symbol thereof, and the essential value has already contributed to the public good.

Why are shares less a symbol, in the absence of legislation expressly providing otherwise, because the corporation lives out of the State? If shares are a symbol of property where they represent an interest in a Georgia corporation, it would seem that shares in a corporation which does its business in another State, derives its franchises from another State, holds its property in another State, when held in Georgia, are nothing but the symbol of property located in another State.

They do not in this last case, even derive franchise or business value from the laws of Georgia, or protection from her government. Therefore upon principle, in the absence of compelling authority, there would seem to be no reason why shares of corporations in the State should pay no taxes, and shares of like corporations chartered elsewhere should be taxed.

Cook on Stock and Stockholders (3 *Ed.*), *sec.* 565.

V.

The State of Georgia has always declared the capital of a corpora-

tion and the shares of its stock to be one and the same thing for purposes of taxation, and further that shares of stock in corporations whose property is located out of the State are not themselves property within the State of Georgia, or subject to taxation.

As early as 1832 it was held that where bank stock is taxed in the hands of the holder, the corporation should not be taxed upon the capital which that stock represents, and that no intention to do this should be drawn from a tax act unless by express words or necessary implication.

Bank of State of Ga. vs. *City of Savannah, Dudley's Reports,* 130.

Where a provision of a railroad charter provided that the stock of a railroad company should not be liable to any greater tax, duty or imposition than that on banks, it was held that stock includes the property of the company.

Rome Railroad Co. vs. *City of Rome,* 14 *Ga.* 275.

Goldsmith, Comptroller-General, vs. *Rome R. R. Co.,* 62 *Ga.* 473, 482.

The exact question in this case, however, both as to stock of railroads within the State of Georgia, and stock of a railroad company situated without the State of Georgia, came before the Supreme Court in the year 1880.

"(*a*) Stock in the company's own road, held by itself, or in other "roads in this State, whose charters limit or exempt taxation there- "on, and whose income is taxed, is not liable; and stock held by the "company in railroads without the limits of this State is not tax- "able here. Stock in a railroad is really but so many shares of its "property, and that property is real estate, for the most part at least, "and taxable by the State in which the road is located."

"(*b*) But bonds, notes, and all other mere evidences of debt fol- "low the *situs* of the creditor, no matter where the debtor lives."

Wright, Comptroller-General, vs. *Railroad Co.,* 64 *Ga.* 783, 799.

This is not *dicta*, but the record in this case shows the point was necessarily involved.

This would seem to settle both the *status* and the *situs* of railroad shares for the purpose of taxation in Georgia.

VI.

The Constitution of Georgia of 1877 *does not invalidate this decision.*

The above decision was rendered in litigation between the Southwestern Railroad Company and the State of Georgia in regard to the taxes claimed to be due for the years 1876 and 1877. (See 64 Ga. 784.)

Appellant claims that the provisions of the Constitution of 1877, adopted after the taxes of that year had accrued, changed this decision, and required the taxation of capital stock. That provision of the Constitution is as follows:

"All taxation shall be uniform upon the same class of subjects, "and *ad valorem* on all property subject to be taxed within the ter- "ritorial limits of the authority levying the tax, and shall be "levied and collected under general laws."

Constitution of Ga. of 1877, *Art.* 7, *sec.* 2, *par.* 1, *Civil Code, sec.* 5883.

The former constitutional provision which was in force when the above decision was made was as follows:

"Taxation on property shall be *ad valorem* only, and uniform on "all species of property taxed."

Constitution of 1868, *Art.* 1, *Par.* 27.

The courts have held that all property, both real and personal, which is not expressly exempted from taxation, constitutes but one class, must be uniformly taxed, and that the taxation must be *ad valorem*.

Atlanta vs. *Stewart*, 109 *Ga.* 80, 96, 97.

It will be observed, however, that these provisions do not undertake to define *what is property within the territorial limits* of the authority levying the tax.

It undertakes to make no change in the decisions recognizing shares of stock not as property, but as mere evidences of the interest in the property of the corporation itself; so that the question at last is unaffected by the provisions of the Constitution, and recurs; whether under the law of the State of Georgia as declared by her courts, shares of stock are necessarily property different from the property held by the corporation, or are, like a bill of lading, a warehouse receipt, or other symbol, mere representatives of such property.

We answer these questions in the language of the Supreme Court of Georgia above quoted:

"Stock in a railroad company is really but so many shares of its "property, and that property is real estate, for the most part at "least, and taxable by the State in which the road is located."

Again, "stock * * * in railroads without the limits of this State "is not taxable here."

64 *Ga.* 799.

The decision from the 109 Ga., above cited, which is relied upon by the Appellant, expressly declines to decide to the contrary, and recognizes that it may be competent to provide against taxing the shares of stock, where all the property which gives them value has been taxed, and indicates that the contrary might be claimed to be double taxation.

109 *Ga.* 98.

The State of Georgia further recognizes this by the provisions of her Code, re-adopted in 1895.

"Bonds, notes, or other obligations for money, on persons in other "States, or of other States, or *bonds of corporations of other States*, "and shipping, are the subject of return and taxation in this State."

Code of 1895, *vol. I., sec.* 776.

The use of the words "bonds of corporations," without including the word "stocks," is significant,—especially when construed in the light of the above decision of the Supreme Court in regard to the non-taxable character of stock representing an interest in a foreign railroad, and the clause in said decision which provides that bonds

follow the *situs* of the holder.

64 *Ga., supra.*

VII.

Where Constitutions prohibit exemptions, and require the uniform taxation of all property, provisions providing that shares of stock shall not be taxed where the property of the corporation is taxed, are valid, and where such Constitutions prohibit double taxation, are generally imperative.

If shares of stock are separate property from capital representing the same, held by the corporation, then of course it makes no difference where the corporation is located,—an exemption of such shares from taxation because the corporate property is taxed would violate a constitutional provision prohibiting the exemption of property. On the other hand, if such shares of stock can be regarded as mere symbols of property within the State in the hands of her own corporations, they can necessarily be regarded as symbolic of property without the State, and as therefore not representing property within the limits of the taxing power.

Mr. Thompson, in his work on corporations, recognizes the existence of a line of decisions which hold:

"Where a tax is laid upon the property of a corporation, whether "in the name of capital or in the form of a tax upon the tangible "property into which its capital has been transmuted—another tax "assessed against the shareholders upon the shares held by them of "the capital stock of the corporation, is double taxation and not per-"missible."

2 *Thompson on Corporations, sec.* 2813.

The identity of the shares and of the capital of a corporation is recognized by the Federal Government in its provisions regarding the taxing of National Bank stock.

2 *Thompson on Corporations, sec.* 2814.

Under a constitution which provides for taxing the property of corporations, the same as individuals; and, further, that uniform laws shall be passed taxing investments in bonds, stocks, &c., it is

held, that to tax both the stock in the hands of the shareholder and the property of the corporation is inconsistent, because unequal taxation.

Cleveland Trust Co. vs. *Lander*, 56 *N. E. Rep.* 1036, 1040.

Says the Supreme Court of California, speaking of her Constitution, which prohibited exemptions from taxation, required uniform taxation, and prohibited double taxation:

"Now, what is the stock of a corporation but its property, consisting of its franchises and such other property as the corporation may own? When, therefore, all the property of the corporation is assessed * * * * then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with. * * * * The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation."

People vs. *Badlam*, 57 *Cal.* 594.

Waterworks vs. *Schottler*, 62 *Cal.* 69.

Says the Supreme Court of Pennsylvania:

"Such taxation (viz.: on the capital and the shares in the hands of the holders), notwithstanding the subtle distinction of the Court below, would be substantially double taxation. Conceding the power of the legislature to tax in this manner, its exercise is never to be presumed. The intent to impose double taxation must be clearly expressed."

Penna. Co. &c. vs. *Commonwealth*, 15 *Atlantic Rep.* 456, 458.

The Constitution of Indiana, section 1, article 10, directs that the legislature shall provide by law for a uniform and equal rate of assessment and taxation. It also provides for the taxation of all property except certain property therein excepted. Under such constitution, the Supreme Court of Indiana has held that a provision prohibiting taxation of shares of capital stock where that which gives it its value has already been taxed in the hands of the corporation, is not an exemption, but the prohibition of double taxation.

Hyland vs. *Central Iron & Steel Co.*, 13 *L. R. A.* 515.

An act providing for taxing the property of a corporation, and providing that its shares of stock shall not be taxed, is not unconstitutional under a constitution providing that all property shall be taxed equally and prohibiting legislative exemptions. Such a provision "is not in fact an exemption, but only a different mode of "assessment of property."

Carroll vs. *Alsup et al*, 64 *S. W. Rep.* 193.

See also to the same effect:

Lewiston Co. vs. *Asotin County*, 64 *Pac. Rep.* 544.

Foster vs. *Stevens*, 13 *L. R. A.* 166, 169.

Bank vs. *Nashua*, 46 *New Hampshire*, 389.

Sherman vs. *Kimball*, 54 *New Hampshire*, 406.

It may be of advantage to consider that the State of Alabama taxes railroad properties not upon the value of their property as so much material, but upon the full value of the railroad as a going concern.

Code of Alabama of 1896, *sec.* 3972.

VIII.

Taxation is never levied by presumption.

No statute of the State of Georgia can be pointed to which expressly levies a tax on corporate stock of a foreign corporation in any different manner from the way in which taxes are levied upon stock of like corporations in this State.

The only line of statute law dealing with this subject, is the question propounded to the taxpayer, inquiring what shares of stock in corporations not chartered by the State he owns. It is an inquiry, and not an assessment or a levy.

It can serve a useful purpose without altering the law as to taxation of shares of stock. By revealing what shares of stock he holds in companies not chartered in Georgia, it enables the tax-assessor to learn if the taxpayer holds shares in such companies, which do not return their capital for taxation at home, but whose shareholders individually return their shares where they reside. Georgia taxes

shares of this description in her domestic corporation, and has always taxed such shares held by her citizens in foreign corporations —but never has taxed shares in either, where the corporation returns all of its property for taxes.

"The subject is not to be taxed unless the language of the statute "clearly imposes the obligation; for taxes are not imposed by impli- "cation."

Endlich Interp. of Statutes, sec. 345.

IX.

The rule of property, or of taxation, established in a State by the decisions of her Courts, will be followed by the Federal Court in dealing with such property or taxation.

1. In this case the Supreme Court of Georgia has established as a rule of property, that shares of railroad stock represent the property of the corporation. That such property is the subject of taxation, where located either within or without the State, but not the shares, which are mere representatives thereof.

Railroad Co. vs. *Wright*, 64 *Ga.* 783, 799.

Where a rule of property is established by the State decisions, it will be followed by the Federal Courts.

Foster vs. *Elk Ford &c. Co.*, 32 *C. C. A.* 560.

Buford vs. *Kerr*, 38 *C. C. A.* 166.

Warburton vs. *White*, 176 *U. S.* 484.

2. The decisions of the State Courts as to State taxation, where not impairing some right claimed under the Constitution of the United States, will be followed by the Federal Court.

Lewis vs. *Munsen*, 151 *U. S.* 545, 549.

Bardon vs. *Land & R. Imp. Co.*, 157 *U. S.* 327, 331.

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